SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 713

WILLIAM JOSEPH BREAULT AND BONNIE JO ELLEN KATHRYN BREAULT,
Petitioners,

vs.

HAROLD L. FEIGENHOLTZ AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF OSCAR J. BREAULT, DECEASED, AND INDIVIDUALLY; ESTELLE ANGELA BREAULT, KENNETH BREAULT AND WESLEY MEMORIAL HOSPITAL A CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED BY THE BRIEF IN OPPOSITION.

1. Did this Court by eliminating former paragraph 3 of Rule 21 which provided that the requirement of paragraph 1 with respect to the filing of a transcript of the record shall be "deemed satisfied" if the petitioner files a copy of the appendices filed by all parties below, together with all the proceedings in the court below, the whole duly certified, intend thereby to require that a petition for cer-

tiorari be accompanied by the original District Court record on appeal including exhibits?

2. If, as contended by respondent Feigenholtz, jurisdictional amount in a will contest brought by the heirs of the testator is not to be determined by the amount which would pass by the contested will if valid, pursuant to the reasoning in *Overby* v. *Gordon*, 177 U. S. 214, 217-218, but is to be determined by the pecuniary consequences to each heir, then are such pecuniary consequences subject to the control of the defendant executor, and are they to be determined from *dicta* and without regard to plaintiffs' good faith claim as to the pecuniary consequences to each of them?

ARGUMENT.

I.

When petitioners filed a copy of the appendices filed by the parties below, together with all the proceedings in the court below, duly certified by the clerk of the court below, with their petition, there was substantial compliance with paragraph 1 of Rule 21 and paragraph 1 of Rule 22. The subsequent filing of all of the original District Court record on appeal with the exception of defendant's exhibits, together with the opportunity of respondent Feigenholtz to have filed his exhibits pursuant to paragraph 4 of Rule 21 obviates any prejudice to respondent Feigenholtz.

An additional question raised in Respondent Feigenholtz's Brief in Opposition warrants the granting of certiorari. It concerns the proper procedure for seeking review in this Court pursuant to its new Rules 21 and 22 effective October 2, 1967.

Respondent's argument is that certified copies of the printed appendices prepared for use by the court below and filed with the petition do not constitute compliance with Rules 21 and 22.

The question derives from the fact that in accordance with long standing practice petitioner did not ask the court below to stay the mandate. See *Carr* v. *Zaja*, 283 U. S. 52 and cases cited therein. Therefore, on July 19, 1967 the mandate of the Court of Appeals was issued and the original record certified by the District Court was returned to that court. On July 21, 1967 the clerk of the District Court notified respondent Feigenholtz to withdraw his "physical and large documentary exhibits, if any", and Feigenholtz withdrew all of his exhibits.

After the petition for certiorari was docketed in this Court and at the suggestion of the clerk of this Court, there having been raised a question as to the meaning of the revised rules, petitioners asked respondent Feigenholtz to stipulate that the case be heard on the printed appendices as certified by the clerk of the Court of Appeals. Feigenholtz refused so to stipulate. Petitioners then asked the clerk of the District Court to transmit the original District Court record to this Court. The clerk of the District Court asked Feigenholtz for his exhibits in order to file them with this Court. Feigenholtz refused to comply with the request. (See correspondence file, Clerk of the Supreme Court, Supplemental Court of Appeals Transcript.)

The clerk of the District Court has now transmitted to this Court all of the District Court record except defendant's exhibits. Rule 21, paragraph 4 permits respondent Feigenholtz to file his exhibits if they are believed by him to be relevant to the issues in this Court and he has not done so.

The argument of respondent Feigenholtz is that under this Court's new rule the only way a litigant can protect his statutory right to file a petition for certiorari in this Court is either to obtain a stay of mandate from the Court of Appeals or from a justice of this Court in

order to retain the district court record in the Court of Appeals for transmission to this Court. This would be a radical departure from past practice and an unreasonable burden on the business of the courts of appeal and of this Court.

It should be noted that there was no complaint below that the appendix description of exhibits was inadequate. (See certified copy of Appellee's Brief and Appendix filed with the Petition.) To the extent that respondent Feigenholtz felt a description was inadequate he set out in full certain of his exhibits in his supplemental appendix, a certified copy of which was filed with the Petition. He fails to show in what respect the description of his exhibits not set out in full is inadequate for the purposes of the petition for certiorari. In fact, he utilizes the printed appendix description of his exhibits in his argument on the merits. (Brief in Opposition, pp. 4-8.)

It is submitted that respondent Feigenholtz has not been prejudiced and that he raises the question solely in an effort to evade a review of important questions of federal jurisdiction. However, immediate resolution of the question raised is one of far-reaching importance to the administration of this Court and of the courts that are subject to review by this Court. Certainly the matter is one that calls for clarification at the earliest possible time and for a resolution that will not unduly impose on the administration of the courts of the federal system. Granting review in this case will afford an opportunity for a speedy resolution of this important question.

II.

The opinion of the court below is clearly erroneous in that it (a) fails accurately to state the manner in which the jurisdictional question arose and was decided, (b) is silent with respect to material facts critical to the District Court's jurisdiction, (c) erroneously concludes from dicta that Oscar's estate was "at all times" insolvent, (d) gives no "reasoned justification" for failing to follow Overby v. Gordon, 177 U. S. 214, (e) holds that jurisdictional amount is to be determined by the pecuniary consequences to each plaintiff, (f) assumes that conditions subsequent to the filing of the action under the control of a defendant executor can be determinative of such pecuniary consequences and (g) holds that the good faith claim of plaintiffs as to the pecuniary consequences to them can be disregarded because this is not an action in which a federal court adjudication of monetary liability to plaintiffs is sought.

Respondent Feigenholtz's Brief in Opposition is replete with misstatements of fact and an attempt to argue the merits of the questions presented by petitioners to this Court for resolution. The remainder of this Reply Brief, therefore, is offered to the Court to correct the inaccuracies of respondent lest the Court be misled into improper decision on the sole question as now before it—whether the case is one appropriate for its consideration.

Contrary to the assertion in the Brief in Opposition, the opinion below is not "clearly correct."

(a) The opinion does not accurately state the manner in which the jurisdictional question arose and was decided.

The opinion states, "Hearing on the motion to dismiss for want of jurisdiction was suspended pending such proceedings" (App. A to Petition, p. 10), but fails to state that on November 16, 1964, District Judge Marovitz

denied the motion to dismiss for want of jurisdictional amount. (App. F to Petition, p. 29, App. 4, 184-185, Petition for Rehearing, pp. 15-17.) At that time, which was after the decision of the Supreme Court of Illinois in *In re Estate of Breault,* 29 Ill. 2d 165, and after the Probate Division of the Circuit Court had allowed executor's attorney's fees to the attorney for respondent Feigenholtz out of the appointive assets, the district judge stated: "There is a substantial estate here involving at least a half a million dollars or more * * *." (App. 185, Petition for Rehearing, p. 15.)

Thereafter respondents filed their answers to the complaint and the cause was at issue on the merits as well as on the jurisdictional amount question as raised by respondent Feigenholtz's answer. (App. 185.) However, there were no further evidentiary hearings and there was no pending motion to dismiss when Judge Marovitz, in the course of ruling on petitioners' motion for leave to file an amended and supplemental complaint and objections thereto undertook to dismiss the cause for want of federal jurisdictional amount. His decision was not based on the evidence heard by Judge Miner. (App. 185-231, Petition for Rehearing, pp. 15-17.) Compare *Sears Roebuck & Company* v. *American Mutual Liability Insurance Company,* 372 F. 2d 435 (7th Cir., 1967).

(b) The opinion is silent with respect to material facts critical to the jurisdictional question.

The opinion does not disclose that in hearings before the late Judge Miner petitioners had proved that at the time of the commencement of this action the inventoried value of Oscar's probate estate exceeded $500,000. (Plaintiffs' Ex. 5 received in evidence March 31, 1961, as shown by Transcript of Proceedings before Judge Miner filed February 1, 1967, App. 62, 65-67, Petition for Rehearing, pp. 3-4.) Respondent Feigenholtz had treated the appointive assets as a part of the probate estate (App. 59-60, 66-69) in

accordance with accepted practice. *In re Estate of Breault,* 63 Ill. App. 2d 246, 264, quoting 3 Restatement-Property (Future Interests-Powers of Appointment) (1940), § 329, pp. 1865-1866. See *In Re Estate of Breault,* 29 Ill. 2d 165, 169.

But after respondent Feigenholtz was served with a summons and a copy of the complaint (App. 157) he filed his amended inventory and claims against the estate and obtained *ex parte* allowances thereof. This was barely before the period for filing claims expired. (App. 157, Petition for Rehearing, pp. 5-6.) See *In re Estate of Breault,* 29 Ill. 2d 165, 170.

The Supreme Court of Illinois held that the appointive assets did not *necessarily* have to be inventoried and accounted for by Feigenholtz as Oscar's executor. *In re Estate of Breault,* 29 Ill. 2d 165, 173, 178. It did not hold that their devolution is unaffected by the will contest.

When this action was dismissed for want of jurisdictional amount no account by respondent Feigenholtz as executor had yet been approved in the state court, and that situation persists today. Also, at that time there were and there still are, pending proceedings in the Probate Division of the Circuit Court of Cook County to ascertain the amount of the estate's claim for an accounting from Feigenholtz and Dahm which petitioners have alleged in the state court, and in this action, exceeds one million dollars. (App. E to the Petition, pp. 23-24, Petition for Rehearing, pp. 11, 21-22.) There has been no hearing as yet in the state court on the accounting filed by Feigenholtz and Dahm, or on the citation proceedings because respondent Feigenholtz and his co-trustee under Kathryn's trust have filed original mandamus proceedings in the Supreme Court of Illinois to prevent the circuit court judge assigned to the Probate Division from holding hearings on the accounting claim. Such mandamus proceedings are pending. *Dahm et al.* v. *Corcoran, Circuit Judge,* No. 40560 in the Supreme Court of Illinois.

(c) *In Re Estate of Breault,* 63 Ill. App. 2d 246, does not constitute a final determination that Oscar's Estate was "at all times" insolvent, and particularly that it was insolvent on July 1, 1960. That case involved an application for fees by the attorney for Feigenholtz as Executor. The Appellate Court recognized that there had been no executor's account approved by the Probate Division of the Circuit Court, that there was yet to be determined the matter of the estate's uninventoried claims for an accounting, and held that the appointive assets are equitable assets of the estate. The fact that they do not pass through the probate estate is merely a matter of administration. Their devolution nevertheless turns upon the validity of the contested will. *Snyder* v. *Steele,* 304 Ill. 387, 394, 136 N. E. 649, 651, Section 286 of the Illinois Probate Act, Chapter 3, Illinois Revised Statutes, 1965, paragraph 286.

(d) The opinion below gives no "reasoned justification" for failing to follow *Overby* v. *Gordon,* 177 U. S. 214, and the Brief in Opposition discloses no genuine distinction.

To depart from the reasoning in *Overby* v. *Gordon,* 177 U. S. 214, in effect requires the federal court to determine the validity of claims against an estate and other collateral matters which should be left to the state court. See, *Farrell* v. *O'Brien,* 199 U. S. 89. Petition for rehearing, pp. 19-20.

(e) The opinion below holds that jurisdictional amount is to be determined by the pecuniary consequences to each plaintiff. This ignores respectable authority that jurisdictional amount is to be determined by the pecuniary consequences "to those involved," including defendants. *Thomson* v. *Gaskill,* 315 U. S. 442, 447. *Ronzio* v. *Denver and WR Company,* 116 F. 2d 604, 606-607 (10th Cir. 1940), and that the interest of heirs in the aggregate is the test. *Overby* v. *Gordon,* 177 U. S. 214, cf. *Pinel* v. *Pinel,* 240 U. S. 594, 597.

(f) The opinion below assumes that conditions subsequent to the filing of the action under the control of the defendant executor can be determinative of such pecuniary consequences contrary to *St. Paul Indemnity Company* v. *Red Cab Company,* 303 U. S. 283, 289-290; *Gulf Refining Company* v. *Price,* 232 F. 2d 25, 30, Cert. Denied, 352 U. S. 981 (5th Cir. 1961); *Aetna Casualty & Surety Co.* v. *Flowers,* 330 U. S. 464, 467-468.

(g) The opinion below disregards the good faith claim of plaintiffs as to the pecuniary consequences to them on the ground that the action is not one in which a federal court adjudication of monetary liability to plaintiffs is sought. The fact is, there was no *ad damnum* in the federal court proceeding in *Sears Roebuck and Company* v. *American Mutual Liability Company,* 372 F. 2d 435 (7th Cir. 1967). In good faith petitioners contend that in the absence of a final account approved by the Probate Division of the Circuit Court, it cannot be said that Oscar's probate estate is insolvent and especially, when that estate has an uninventoried claim for an accounting pending.

Petitioners contend that if Oscar's Will is set aside and the appointive assets totaling over $400,000 are distributed to the takers in default of appointment named in Kathryn's Will, nevertheless such takers in default of appointment will hold the assets on a constructive trust for the benefit of Oscar's creditors, wife and children. *In re Estate of Breault,* 63 Ill. App. 2d 246, 264-266; *Gilman* v. *Bell,* 99 Ill. 144, 149-151 (1881), A. L. I. Restatement of Property, § 347 (d), A. L. I. Restatement of Restitution, § 184 (j). The assignment by one of the takers in default of appointment of their "vested remainder" to petitioners is, petitioners suggest, a patent recognition of such constructive trust.

Contrary to the assertion in the Brief in Opposition, it is a fact that only one claim was filed against Oscar's probate estate *at the time this action was commenced* (App. 159). The claims relied on by respondent Feigenholtz

to render Oscar's personal estate insolvent were filed after the commencement of this action in the 12 days remaining for the filing of claims. The statement of the Supreme Court in 1963 that "we see neither waste, wilfullness, nor bad faith" was not intended to approve Feigenholtz' *ex parte* consent to his and Dahm's claim against Oscar's estate. The matter of the validity of those claims approved in an *ex parte* proceeding has yet to be determined. So long as the executor has not filed a current or final account, the *ex parte* claims are subject to being set aside in the probate proceedings. *Bocock* v. *Leet*, 210 Ill. App. 402, 412.

There has been no change of course by petitioners in their efforts to secure an accounting from respondents Feigenholtz and Dahm. Apparently seeking an accounting in the federal court was the wrong route. *Breault* v. *Feigenholtz*, 358 F. 2d 39, 46, but the choice of the wrong route is never an election of remedies. *Southern Pacific Company* v. *Bogert*, 250 U. S. 483, 489-491; *In re Estate of Oppenheim*, 63 Ill. App. 2d 284, 290-291.

The citation proceedings are exactly what respondent Feigenholtz insisted in this Court in No. 203, October Term, 1966, was the right route. (Brief for Respondent in Opposition, No. 203, October Term, 1966, p. 10.)

CONCLUSION.

The Brief in Opposition fails to disclose any reason why this Court should not grant the Petition to decide important questions concerning the proper test for the measure of jurisdictional amount in diversity actions.

Respectfully submitted,

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